

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1353

To be argued by
WILLIAM M. ERLBAUM
Time Requested: 20 Minutes

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1353

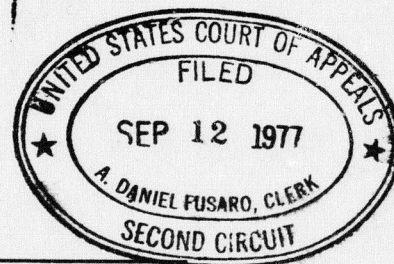
In Re Grand Jury Subpoena Directing
EDWARD TAYLOR
To Appear And Testify Before A Grand Jury On
July 20, 1977 at 10:00 A.M.

APPELLANT'S BRIEF AND APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

In Re Grand Jury Subpoena
Directing

Docket No. 77-1353

EDWARD TAYLOR

To Appear And Testify Before
A Grand Jury On July 20,
1977 at 10:00 A.M.

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APPELLANT'S BRIEF

Preliminary Statement

EDWARD TAYLOR appeals from a final order of the Honorable Henry Bramwell, United States District Judge for the Eastern District of New York, made on July 29, 1977, directing that EDWARD TAYLOR be prohibited from retaining William Erlbaum, Esq., in connection with the grand jury subpoena served on July 13, 1977. (Title 28 U.S.C., Section 1291)

Question Presented

1. Was the in-camera examination of "secret" documents by Judge Bramwell leading to his subsequent order enjoining the witness, EDWARD TAYLOR, from retaining the counsel of his choice, violative of Taylor's Sixth Amendment right to counsel of his choice, his First Amendment right to freedom of association and freedom of speech, his Ninth Amendment right to privacy, and his Fifth Amendment right to procedural due process of law?

F A C T S

Appellant, EDWARD TAYLOR, retained the services of William M. Erlbaum, Esq., to represent him in his appearance before the grand jury investigating the operation of the Direct Lease Day Care Center Program within the City of New York. (9)*/

On July 29, 1977, Stanley Marcus, an Assistant United States Attorney, moved before the Hon. Henry Bramwell, United States District Judge, for an order directed against the witness, EDWARD TAYLOR, forbidding him from retaining the services of William Erlbaum, Esq., in connection with a grand jury subpoena served on July 18, 1977. The application was made in the Judge's chambers. Present were Messrs. Marcus, Taylor, Erlbaum, Jeffrey Podell, and at times Leonard Simon and Assistant United States Attorney Samuel Dawson.

It was the position of the government that: "There is a question as to whether there is a conflict of interest in the representation by Mr. Erlbaum of Eddie Taylor and a number of other individuals, Gary Joseph, Leonard Simon, and Jeff Podell." (3)

*/ Page references are to the minutes of proceedings before Judge Bramwell on July 29, 1977.

The government went on to state to Judge Bramwell that it was their "belief" that the responses of Mr. Taylor "might" pit Taylor against Podell and Simon and one, Gary Joseph (6). Erlbaum was attorney for Podell, Simon, and Joseph, as well as for appellant. The prosecutor took the position that if Taylor invoked his Fifth Amendment rights not to testify, the government intended to seek a formal immunity order from the Justice Department. With immunity, the government theorized Taylor would then be in direct opposition to the position asserted by the others. (Gary Joseph, Jeffrey Podell and Leonard Simon). The government indicated that they were "convinced" that there was a conflict of interest (7). The government refused to disclose to appellant what that conflict of interest was. Instead, the government stated that it was their intention to hand up to the court, in-camera, an affidavit from the prosecutor which contained both some testimony presented in the grand jury along with some documents.

The government did not argue or even suggest that joint representation would frustrate the grand jury's investigative function. The government's position was that it was concerned that EDWARD TAYLOR, as an individual, may not be receiving adequate representation (22). The Assistant United States Attorney did not profess any governmental

interest in its seeking to forbid Taylor to hire counsel of his choice, Mr. Erlbaum, as his attorney.

Appellant's attorney, William Erlbaum, vigorously objected to any in-camera proceedings (9). Erlbaum stated that the test was not whether the government would be giving the witness immunity - that in and of itself did not create a conflict. The essential issue is whether one gentleman is in fact "pitted against" another (9). Erlbaum indicated that Taylor had asked him to represent him and he had agreed to the employment. As far as they could ascertain, there was no conflict of interest (6).

Erlbaum also pointed out to the court that the witnesses in this case are related by both business and family ties. He has been the family attorney for many years and because of his continuous relationship he is fully familiar with all the facts and circumstances presented by these witnesses. In fact, his representation goes back some ten years and includes representing most of the witnesses in the investigation of the same subject matter by Mr. Ruskin's office, who was Commissioner of Investigation of the City of New York (8).

Judge Bramwell acknowledged that he had no background knowledge of the case (9). On the bald statement of the prosecutor the court conducted an in-camera viewing of the prosecutor's secret advices and materials and then signed an order enjoining Mr. Taylor from retaining William Erlbaum as his attorney. This was done without any evidentiary hearing and without findings of fact. Appellant was summarily denied any opportunity to controvert the merits of the government's secret allegations.

POINT I

THE IN-CAMERA EXAMINATION OF "SECRET" DOCUMENTS BY JUDGE BRAMWELL LEADING TO HIS SUBSEQUENT ORDER FORBIDDING THE WITNESS, EDWARD TAYLOR, FROM RETAINING THE COUNSEL OF HIS CHOICE, VIOLATED TAYLOR'S SIXTH AMENDMENT RIGHT OF COUNSEL, AND HIS FIFTH AMENDMENT RIGHT TO PROCEDURAL DUE PROCESS OF LAW.

Upon the unchallenged, selective and subjective representations of an Assistant United States Attorney, Judge Bramwell arbitrarily determined in-camera and ex parte that Mr. Edward Taylor could not retain William M. Erlbaum (a long-time family attorney) as the attorney of his choice. Appellant's right to counsel cannot be so lightly frittered away.

A. THE SIXTH AMENDMENT RIGHT TO COUNSEL

The Sixth Amendment to the United States Constitution guaranteeing the right to counsel necessarily includes a concomitant right to counsel of his own choosing. Glasser v. United States, 315 U.S. 60 (1942); Faretta v. California, 422 U.S. 806 (1975). It is the witness who must be free to personally decide whether in his particular case his choice of counsel is prudent or foolish. All that the Constitution requires is that one makes the choice with his "eyes open" (see Adams v. United States, 317 U.S. 269, 279 (1942)). It is the witness,

not the government, who will bear the personal consequences of that choice. In the long history of British criminal jurisprudence there was only one tribunal that ever adopted a position of forcing counsel upon an unwilling defendant in a criminal proceeding. That tribunal was the Star Chamber (discussed in Faretta, supra, 422 U.S. at 821-822 (1975)).

In Faretta, the Supreme Court held that the right to choose one's own counsel permits one to dispense with counsel altogether. This right exists despite the fact that one may conduct his own defense foolishly and to his own detriment. The choice must be honored, however, out of "that respect for an individual which is the life's blood of the law." Illinois v. Allen, 397 U.S. 337, 350-351, 90 S.Ct. 1057 (1970) (Brennan, J., concurring). It would be strange indeed if the right to counsel permits one the correlative right to dispense with counsel altogether, but forbids him from waiving his lesser right to conflict-free representation.

The definition of one's "interest" should almost invariably be supplied by one's self.^{*/} Here, the government

^{*/} Is it in one's interest to hire a civil lawyer or a criminal lawyer? A young lawyer or an old lawyer? His family lawyer (who has also been his brother-in-law's lawyer) or another lawyer?

in the name of protecting Edward Taylor's right to counsel of "his" choice has invaded Mr. Taylor's autonomy.

Freedom of choice is no stranger to the constitution. A few such choices include the right of every accused to testify in his own defense or to decline to do so (Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971)); the right to be present at all stages of one's trial or to waive that right (Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330 (1933)); the right to waive jury trial (Adams v. United States, 317 U.S. 269, 63 S.Ct. 236 (1942)); and the right to waive counsel at custodial interrogation (Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1965)).

The court in Faretta further observed that the seminal cases establishing the Sixth Amendment right to counsel (Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792; Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932), etc.) must not be construed as sanctimonious interference with the right to representation by counsel of one's own choice:

"But it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want. The value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly

foreign to them. And whatever else may be said of those who write the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice [footnotes omitted]" 422 U.S. at 833-834, 95 S.Ct. at 2540, 45 L.Ed.2d at 580 (1975).

"Free choice" also means the right to choose counsel whose ability to provide counsel may in fact be impaired by a conflict of interest. In United States v. Arredo-Sarmiento^{*/} 524 F.2d 591 (2d Cir. 1975), this court held that a client may waive his Sixth Amendment right to effective assistance of counsel, free from conflict of interest (and to confrontation of witnesses) just as he may knowingly and intelligently waive any constitutional right (citing Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938)). The court in remanding the case to the district court with directions to give the defendants an opportunity to make an intelligent and knowing waiver of their right to counsel free from conflict of interest, stated:

"We are mindful of the factors on which the court below based its decision, including in particular the witnesses' interests in preserving the confidentiality of their privileged communications, but the district court did not give sufficient weight to the appellants' rights. Although the right to an

^{*/} The conflict in Arredo was clear - the attorneys representing Arredo-Sarmiento had previously represented three government witnesses. The witnesses had refused to waive their attorney-client privilege with respect to confidential communication that might be used on cross-examination. The conflict and potential harm to the defendants was real.

attorney of one's choosing is not unlimited, the Sixth Amendment does give some protection to a criminal defendant's selection of retained counsel [citations omitted]" (524 F.2d at 592).

* * * * *

"This Circuit has, in civil cases, frequently stressed the responsibility of the district courts and the bar to avoid situations in which attorneys' conflicts of interest may endanger the confidentiality of clients' privileged communications, as well as cast public doubt on the ethics of the legal profession and the integrity of the judicial process. See, e.g., *Hull v. Celanese Corp.*, 513 F.2d 568 (2 Cir. 1975); *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268 (2 Cir. 1975); *General Motors Corp. v. City of New York*, 501 F.2d 639 (2 Cir. 1974); *Emle Indus, Inc. v. Patentex, Inc.* 478 F.2d 562 (2 Cir. 1973). Because these civil cases do not involve the crucial factor of the criminal defendant's Sixth Amendment rights, however, they are not controlling in the present case." (524 F.2d at 592-593).

In accord, *United States v. Garcia*, 517 F.2d 272, 277 (5th Cir. 1975); *United States v. Wisniewski*, 478 F.2d 274 (2d Cir. 1973); *United States v. Sheiner*, 410 F.2d 337 (2d Cir. 1969); *United States v. Abraham*, 549 F.2d 236 (2d Cir. 1977).

Although the right to effective assistance of counsel is fundamental and guaranteed by the Sixth Amendment so that the denial or impairment of such right is tantamount to a denial of due process of law (*Glasser v. United States*, 315 U.S. 60 (1942)), the courts have held that since this right is personal to the

accused it may be effectively waived. Walker v. United States, 422 F.2d 374 (3d Cir. 1970). As the Fifth Circuit succinctly stated in Holland v. Henderson, 460 F.2d 978 (1972):

" . . . A defendant may knowingly waive his right to separate counsel just as he may knowingly waive the assistance of any counsel, but where an attorney undertakes joint representation and foresees, or should have foreseen, conflicting duties to his clients, he must suggest separate counsel and make a sufficiently full disclosure of the conflict that his clients may knowingly waive their right to counsel."

In the case at bar, after receiving undisclosed in-camera information from the Assistant United States Attorney, Judge Bramwell ordered Edward Taylor to refrain from retaining the services of William Erlbaum. This act was performed despite the fact that in Mr. Taylor's mind there was no conflict, and Mr. Taylor strongly desired the services of Mr. Erlbaum, notwithstanding his representation of others in the investigation. Mr. Taylor, in short, was denied his right to waive conflict-free counsel.

Is the government suggesting that a conflict arises ipso-facto by a mere grant of immunity? Such a one-sided belief could only be grounded in the government's view of the evidence in the case. Does the government through the threat of contempt and perjury evidently hope to force Taylor to tell

its version of the facts and fulfill its own claim of conflict? It is submitted that any such attempt by the prosecution would be a perversion of the fact-finding function of the grand jury and an abuse of its operation and powers by the prosecutors. If there is a conflict of interest, it is not with the witness, but with the prosecutor abusing the grand jury to his own end. See, for potential abuse of grand jury power, Woods v. Georgia, 370 U.S. 375; United States v. Briggs, 514 F.2d 794 (1975).

Taylor was specifically placed on notice that if his answers didn't incriminate others he was a liar. He was told by Judge Bramwell that he would be asked questions "requiring you to implicate others." [emphasis added] (30). This warning necessarily presupposes that the government's rendition of the facts is the "truth" and if Taylor deviates from the government's line he is opening himself up to a perjury charge. The tactic of dictating to a witness what he must say is an interference with the grand jury's investigative function.

It is no part of a District Court Judge's functions or powers, to resolve credibility problems as between several grand jury witnesses.

Here, Mr. Taylor, and his counsel, made clear that, contrary to the government's assertion (6) and to Judge

Bramwell's conclusion that the secret advices established a likely conflict (27), he, Taylor, does not possess information pitting him against Messrs. Joseph, Podell, or Simon (12, 20; 21, 27-30). The government's claim to the contrary must fall in the face of Taylor's position; if for no other reason, because neither Mr. Marcus nor Judge Bramwell possess any personal knowledge concerning Mr. Taylor's involvement in the direct lease day-care program.

Although the prosecutor failed to cite any authority concerning grand jury witnesses to Judge Bramwell^{*/}, appellant is aware of the fact that there is a rare species of cases which

^{*/} The government in oral argument relied on two cases to sustain its position, Abraham v. United States, 549 F.2d 236 (2d Cir. 1977), and United States v. Bernstein, 533 F.2d 775 (2d Cir. 1976). Both cases are inapposite to the fact pattern at bar. In Abraham, the trial judge, when faced with the likelihood of conflict in a single firm's representation of two defendants, conducted a hearing to determine whether a conflict existed as to deny either defendant a fair trial. After a searching inquiry of the two defendants the court found they made a knowing and voluntary election of the same counsel. No convincing evidence of prejudice to either defendant arose from the joint representation. In Bernstein, the district court refused to accept a waiver by a defendant at trial. The waiving defendant's attorney was retained and paid by her co-defendant's employer. The court found actual conflict of interest existed because the ultimate defenses presented by the employer and employee were at direct loggerheads with each other. The underwriting of the employee's defense by the employer co-defendant raised a significant probability of prejudice to the employee defendant.

have interfered with a grand jury witness' free choice of counsel. Pirillo v. Takiff*/ 341 A.2d 896 (St. Ct. Penna

*/ In Pirillo v. Takiff, twelve policemen were subpoenaed before a special grand jury investigating police corruption. All twelve were represented by the same two attorneys. The attorneys were retained by a third party, a police union known as the "Fraternal Order of Police (F.O.P.)". It was the stated public policy of F.O.P. to resist and stonewall the grand jury. In looking to the record the court in Pirillo found that the probability of a conflict of interest and obstruction of the grand jury investigation was clearly demonstrated by the attorneys' fee compensation arrangement with F.O.P., and the organization's avowed purpose of obstructing the grand jury; the alleged specific involvement in criminal activity of the subpoenaed policemen demonstrated by the Crime Commission Report; the testimony of the policemen and the attorneys at the evidentiary hearing which demonstrated the divided loyalties of the attorneys and the limitations of their ability, under those circumstances, to act consistently in the best interests of their individual clients; and, finally, the likelihood of open-ended representation by the attorneys should other policemen be subpoenaed.

Pirillo is in marked contrast to the case at bar: William Erlbaum is not engaged in an open-ended representation of members of the day care industry; the people involved herein have not stated that their intention is to block the grand jury investigation (in fact, Mr. Simon testified before the grand jury without immunity and he and Mr. Joseph have freely spoken to the prosecutors (8, 11, 24)). The record fails to show that any witness or group is exercising any economic or coercive leverage over any other witness forcing him to accept Mr. Erlbaum as his attorney. No conflict exists in the minds of Mr. Erlbaum and his clients.

1975); In Re Gopman^{*/}, 531 F.2d 262 (5th Cir. 1976); and In Re Matter of Grand Jury Proceedings^{**/} (Hoffa) Misc. No. 76-205 Eastern District of Michigan, Southern Division, July 9, 1976.

^{*/} In Re Gopman, is likewise inapposite to the facts at bar. There counsel was disqualified after he attempted to represent both a union and three officials of the union before a grand jury investigating breaches of fiduciary responsibilities of a union official imposed by the Landrum-Griffin Act. Counsel in Gopman was in effect attempting to represent both the victim of the alleged wrongdoing and the wrongdoer at the same time. The conflict being clear on the face of the record was found by the court to justify the disqualification. Faced with a definite threat to the well-being of an in effect "unrepresented" union the court acted because of strong public interest.

^{**/} In the Matter of Grand Jury Proceedings, four witnesses were subpoenaed before a grand jury investigating the disappearance of Jimmy Hoffa. All the witnesses were represented by the same counsel. All the witnesses refused to testify. Anthony Provenzano was the target of the investigation. Provenzano was also the head of the Teamsters Local in which all the witnesses were employed. The attorneys involved were the retained general counsel of the Local. It was apparent that the Union was using its "muscle" to obstruct the operation of the grand jury by having its counsel and employees "run interference" for Provenzano. The court found that the open-ended representation by union counsel of all union people called before a grand jury investigating union officials who were targets of a major inquiry had stalled the grand jury. In the case at bar no such claim has been made by the government.

In Pirillo, Gopman, and Hoffa, counsel were in whipsaw situations between the sides they purported to represent. In the instant case, Eddie Taylor seeks representation by his family counsel, in a matter in which his entire family is involved and in which neither he nor his counsel see any conflict with the other witnesses. All that he asks is that if a conflict does exist, that it be demonstrated. The government on the other hand has not affirmatively established an existing conflict of interest in Mr. Erlbaum's representation of any single witness that would vitiate any waiver, nor has it pointed to any superior governmental interest or policy consideration making the group representation at bar injurious to the grand jury function. Absent the ability of the prosecutor to demonstrate either concern in an open and candid fashion, the waiver of one's right to separate counsel must be sustained, if, in fact, a conflict exists at all.

It would be a travesty of our American system of justice to prohibit subpoenaed witnesses before a Grand Jury to have multiple representation of their choice in the face of intelligent waivers of their right to conflict-free counsel. As the United States Supreme Court said in Adams v. United States, 317 U.S. 269, 279-280 (1942):

"The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law . . .

* * * * *

"What were contrived as protections for the accused should not be turned into fetters . . . To deny an accused a choice of procedure in circumstances where he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.

* * * * *

". . . When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution."

THE FIRST AMENDMENT RIGHT TO FREE ASSOCIATION AND FREE SPEECH AND THE NINTH AMENDMENT RIGHT TO PRIVACY.

The constitutional rights at stake in this case are broader than the Sixth Amendment right to counsel of one's own choosing. Important First and Ninth Amendment rights are necessarily involved.

Barring a showing by the government that the aim of multiple grand jury witnesses is to obstruct and hinder grand jury functions, the government cannot on its own stead instruct one not to cooperate with members of his family in order to confer with

and appraise each other as to the allegations raised against them by the government and to share each other's fears.

United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 91 S.Ct. 1076 (1971); United Mine Workers of America, Dist. 12 v. Illinois State Bar Asso., 389 U.S. 217, 88 S.Ct. 353 (1967); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S.Ct. 1113 (1964); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328 (1963). As the court stated in Railroad Trainmen:

"It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them. . . rights which would be vain and futile if the workers could not talk together freely as to the best course to follow . . .

A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits . . . Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, cf. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, and for them to associate together to help one another to preserve and enforce rights granted them under federal laws cannot be condemned as a threat to legal ethics." (377 U.S. at page 7)

Moreover, rights of free speech and of due process in family relations are gravely endangered by the government's actions in this case. Under the court's order can Mr. Taylor

talk to Mr. Erlbaum or the members of his family with whom heretofore he had been united when faced with official accusation? Doesn't the First Amendment prohibit a stripping of freedom of expression between citizens unless a clear danger and prior justification is shown by the government prior to the taking? DeJonge v. Oregon, 299 U.S. 353 (1937); Feiner v. New York, 340 U.S. 315 (1951). The Due Process Clause has traditionally protected family rights. The government has cut off Mr. Taylor from his kinfolk, driving an injunctive wedge between them hoping to force him to be their accuser. Can such a drastic and anti-social result come about solely on the singular representations of the United States Attorney? The Constitution requires a more judicious handling of domestic relations. Meyer v. Nebraska, 262 U.S. 390 (freedom of instruction in schools); Pierce v. Society of Sisters, 268 U.S. 510 (1925), (right to choose private education for children); Skinner v. Oklahoma, 316 U.S. 535 (1944), (right to procreation); Prince v. Massachusetts, 321 U.S. 158 (1944), (State has the right to protect its children); Griswold v. Connecticut, 381 U.S. 479 (1965), (right to privacy in personal affairs); Loving v. Virginia, 388 U.S. 1 (1967), (Freedom from arbitrary restrictions on marriage); Roe v. Wade, 410 U.S. 113 (1973) (abortion).

B. THE FIFTH AMENDMENT PROCEDURAL DUE PROCESS VIOLATION.

The summary procedures used in stripping appellant of important constitutional rights show little regard for even the minimal protections of Due Process of Law. The record is bereft of any concern for appellant's Right To Be Heard. It is unqualifiedly maintained by the appellant that the procedure employed by Judge Bramwell, when neither Mr. Taylor nor his desired counsel, Mr. Erlbaum, had an opportunity to examine the "secret papers" presented by the prosecutor - to aid in intelligently determining whether a conflict of interest did in fact exist - was in utter disregard of Mr. Taylor's rights to Due Process of Law and free choice of counsel.

Procedures strikingly similar to those used by Judge Bramwell were severely criticized by the Superior Court of Pennsylvania in In re January 1974 Special Investigating Grand Jury,^{*/} 361 A.2d 325 (1976). In that case the special prosecutor investigating kickbacks in the Philadelphia School Construction Program sought to prohibit attorneys from representing more than one of the three witnesses who had invoked the privilege against self-incrimination before the grand jury.

^{*/} It is significant to note that the court was necessarily bound by the Pirillo case, a decision of Pennsylvania's highest court.

The prosecutor argued that all three had knowledge of the alleged scandal and refused to testify as to their own or others' involvement. He presented to the supervising judge in-camera information supporting the State's petition for disqualification. The nature and character of the information supporting the prosecutor's position that a conflict of interest existed was not disclosed to the witnesses or to their attorney. The request for disclosure and the opportunity for intelligent discussion of the problem was denied because the information was "grand jury material." As in the case at bar, no hearing was held; nor were the opinions, thoughts and understanding of the witnesses and their counsel ascertained. The only oral argument was as to the procedures employed.

Therefore, like the situation at bar, where the witness was not given an evidentiary hearing but where instead secret advices were given to the Judge by the prosecutor, the supervising judge disqualified counsel upon the prosecutor's unassailable perception of counsel's supposed conflict of interest. The Superior Court on appeal found that this secret exchange of information between the two government officials, prosecutor and judge, did not pass constitutional muster and arbitrarily denied the witnesses counsel of their choice. The Superior Court might as well have been writing about Mr. Taylor's situation when it remanded the petition stating:

"Returning to the instant case we ask, 'To what evidence of record can we look in support of the court's order disqualifying appellant herein?' The answer is, 'None.'

. . .

Hence, it is not at all clear that the attorneys in the instant case necessarily, or even probably, acted in a fashion inconsistent with the best interests of at least one of the witnesses, at least insofar as that witness perceived what his best interests were" (361 A.2d at page 330).

Insofar as the prosecution's bald assertion that the judgment of the supervising judge based on the in-camera examination should receive deference, the Superior Court noted that even if the constitutional rights of the witnesses were protected by this inquiry:

" . . . we still would have to remand for a new in-camera hearing, to be recorded, so that appellants would have an opportunity for a meaningful appeal. However, we are of the opinion that the right of an attorney to pursue his profession and the concomitant right of the witnesses to have counsel of their choice, cannot be decided on the basis of a secret session, even in relation to a grand jury investigation where the special prosecutor presents information to the supervising judge concerning disqualification of an attorney in the representation of more than one witness. A formal hearing is mandatory. . ." (emphasis added)

"In the instant situation, both the witnesses and the attorneys stand to be deprived of rights closely related to invaluable constitutional rights; to wit, the right to counsel of one's choice and the right to practice one's profession, respectively. Unless a more compelling state interest is demonstrated, the state may not dispense with these rights by in-camera hearing, thus denying appellants the ordinary, minimal protections of due process of law" (361 A.2d at page 330).

Due process necessarily requires that before a court or any organ of government can take away a right guaranteed by the Constitution, the ability to be intelligently heard must be given to the aggrieved party. An evidentiary basis must support the taking of a constitutional right. This protection unquestionably attaches to the right to counsel of a witness called to a federal grand jury and has been adopted by the federal courts. In In Re Grand Jury Empaneled January 21, 1975 (Curran), 536 F.2d 1009 (3d Cir. 1976), the court, in reversing the district judge's disqualification of an attorney representing multiple witnesses, cautioned:

"We have carefully reviewed the record of the proceedings below and find it devoid of evidentiary fiber and sinew to support the district court's conclusion and its draconian order interfering with the appellants' important rights to legal representation. . . . there is no testimony or other evidence in this record indicating 'whether [appellants] would expect to continue to assert the privilege against self-incrimination even if, denied [Mr. Koelzer's] services, they elected to dispose [sic] with counsel entirely or to retain separate and exclusive counsel.'

Thus, confronted with hypotheticals and not evidence, with rhetoric and not fact, the district court erred in stripping appellants of the counsel of their choice. Without more - and there is no more in this record - appellants' invocation of the Fifth Amendment before a grand jury investigating them, jointly and severally, could not serve to vitiate the important right to legal representation of one's choosing." (536 F.2d, at 1012-13)

Similarly, the United States Court of Appeals for the District of Columbia in, In Re Investigation Before the April 1975 Grand Jury, 531 F.2d 600 (1976), held that the district court's bar of an attorney from representing twenty-one union members (19 of whom invoked the Fifth Amendment privilege) before a grand jury investigating destruction of the Washington Post's property during a pressman's strike was premature. The court ruled the government should have explored in open court why privilege was being asserted by a particular witness, whether the claim was justified, and whether those answers justified the government's claim of conflict of interest by the group's attorney. In short, the government had a remedy in going into open court and testing the claim of privilege (18 U.S.C. Sections 6002 and 6003) and the court added:

"Until accommodation in that matter has been demonstrated to be not feasible or contrary to the public interest, it is surely premature to seek it through disqualification of counsel whose advice to his clients the Government does not like."

The teaching of the above cases is succinct - the burden of proof rests heavily on the government to demonstrate upon a clear showing after a full adversary evidentiary hearing without secret inquests that multiple representation of grand jury witnesses by single counsel is a clear threat to the legitimate investigative function of the grand jury. To allow an Assistant United States Attorney to arbitrarily select

documents based on his own perception of a case and present them to a United States District Judge, in secret, is a denial of the most elemental concepts of Due Process of Law.

A review of the scanty facts reveals that upon receipt of a grand jury subpoena by Mr. Taylor, he retained Mr. Erlbaum to represent him. This was an act of free choice. Mr. Erlbaum had previously represented Messrs. Podell, Simon, Joseph and Getz in the same investigation. Up to this day, the government could point to no facts which established a conflict of interest by Mr. Erlbaum in representing these witnesses. Over the past ten years Mr. Erlbaum served as family and personal counselor to all of these men and represented all of these men when the same subject matter, now raised by the prosecutor, was investigated by Robert Ruskin, Esq., in 1970-71, when he was Commissioner of Investigation of the City of New York.

Judge Bramwell acknowledged that he was unfamiliar with the background of the investigation (9). The prosecutor stated the documents in his possession, part of the grand jury record, would show a conflict between Mr. Taylor and the other witnesses. No evidentiary hearing was held concerning this claimed relationship between the parties. (No communication was received from the grand jury or its foreman as to its own independent view or belief as to the prosecutor's assertion.) Judge Bramwell agreed with the prosecutor that there was a conflict based on

the latter's subjective interpretation of the secret advices given to the court. Judge Bramwell did not attempt to elicit the views of the witnesses or Mr. Erlbaum as to the probative value of the secret material. No attempt was made to determine whether the material handed over by the prosecutor was in fact false or misinterpreted.*/

Judge Bramwell, upon the secret advices of the prosecutor, and without any findings of fact, in effect ordered Mr. Taylor to fire the lawyer of his choice (30). Not only is the record bereft of factual basis for the determination, but for aught it appears, Judge Bramwell's only legal conclusion was as to the "likelihood" of a conflict, not as to the actual existence of a conflict (27). It is submitted that in adopting the secret procedure Judge Bramwell did not strike a proper balance between the government's right to investigate through the grand jury and the superior right of all the witnesses

*/ The government made no denial of the cooperation of the parties years earlier with the New York City Department of Investigation, nor of the fact that Mr. Simon consented to appear before the federal grand jury and spoke freely for hours with two Assistant United States Attorneys, nor of the fact that Mr. Joseph has previously submitted to an office interview with federal prosecutors, nor to the family's turning over of hundreds of pounds of documents concerning the direct-lease day-care program to the New York City Department of Investigation (4, 5, 11, 14, 24, 26, 27, 30).

in this case to freely choose their own counsel, waive their rights to conflict-free counsel, and to freely speak and associate with each other. No species of secret proof can take precedence over these basic rights.

The stripping of a fundamental constitutional right without a hearing is the very antithesis of Due Process. The right to counsel of one's choice cannot be treated so lightly and tangentially as was done to Eddie Taylor in the Chambers of Judge Bramwell. Mr. Taylor was told by Mr. Marcus and Judge Bramwell that based on secret information, there is a conflict in your retention of Mr. Erlbaum and therefore you cannot retain him. Not a scintilla of justification was given by the court for this conclusion. No hearing was held to determine the facts. Such a procedure is an insult to the bar in particular and constitutional rights in general. .

Ironically, if Mr. Taylor purchased consumer goods on credit and not legal services in a criminal action, he would have had more rights with the finance company than those afforded to him by the government and Judge Bramwell before the grand jury. See, Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820 (1969); Carey v. Sugar, ____ U.S. ____, 96 S.Ct. 1208 (1976).

It is disingenuous in the extreme for the government to hide behind the skirt of supposed grand jury secrecy and

play a game of peek-a-boo, when its stated aim is to insure that Mr. Taylor receives adequate representation. The words "grand jury secrecy" are not a talisman in whose presence the Due Process Clause fades away and disappears. When justice requires it, if a particular need is shown, the advantages gained by the continued secrecy of grand jury evidence are clearly outweighed by a countervailing interest in disclosure. Pittsburg Plate Glass Company v. United States, 360 U.S. 395, 79 S.Ct. 1237; United States v. Marchisio, 344 F.2d 653 (2d Cir. 1965); United States v. Weinstein, 511 F.2d 622 (2d Cir. 1975); In Re Biaggi, 478 F.2d 489 (2d Cir. 1973). The boiler plate instructions of Rule 6(e) of the Federal Rules of Criminal Procedure cannot be mechanically applied when one's fundamental rights are being taken away. Inquiry is required as to the nature and interpretation of the materials relied on by the government in denying appellant's First, Fifth, Sixth and Ninth Amendment rights. As the Pennsylvania Superior Court stated in In Re January 1974 Special Investigating Grand Jury, at 361 A.2d 325, at page 331:

"... the need for grand jury secrecy should not be given such overriding significance that multiple representation, coupled with an in-camera discussion of the facts with the supervising judge, will suffice to support a petition to disqualify an attorney."

The purpose of grand jury secrecy is to protect the members of the grand jury and the witnesses who testify before it from the improper influence of the targets of the investigation. An adversary hearing to determine whether a conflict exists between counsel and a witness serves to foster this goal because it would root out improper representation and prejudices before the witness is called upon to testify. However, the premier right of a witness to counsel of his choice in the advent of his appearance cannot be denied based on the ex parte interpretation by a prosecutor of his case. Denial must be based on facts established in open court.

C O N C L U S I O N

FOR THE FOREGOING REASONS THE ORDER
BELOW SHOULD BE REVERSED.

Respectfully submitted,
LYON & ERLBAUM
Attorneys for Appellant
EDWARD TAYLOR
123-60 83rd Avenue
Kew Gardens, New York 11415
(212) 263-3235

ON THE BRIEF:

WILLIAM M. ERLBAUM
CHARLES WENDER
EDWARD H. JURITH

A P P E N D I X

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ST/OFFICE	DOCKET YR. NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	R 23	DEMAND \$	JUDGE NUMBER	JURY DEM.	DOCKET YR. NUMBER
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PLAINTIFFS						DEFENDANTS					

APPEAL

In Re Grand Jury Subpoena
Directing

EDWARD TAYLOR

To Appear and Testify Before
a Grand Jury on July 20, 1977
at 10:00 A.M.

CAUSE

SEEKS: APPEAL TO CIRCUIT COURT FROM ORDER PROHIBITING EDWARD TAYLOR
FROM RETAINING WILLIAM ERLBAUM ESQ. IN CONNECTION WITH A GRAND
JURY SUBPOENA.

ATTORNEYS

For Edward Taylor:
Lyon and Erlbaum
123-60 83rd Avenue
Kew Gardens, N.Y. 11415
263-3235

FOR U.S.A.
U.S. Atty-E.D.N.Y.
A.U.S.A. Stanley
Marcus

CHECK HERE IF CASE WAS FILED IN CHINA	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
				JS-5	
				JC-6	

In re Grand Jury proceeding-- Edward Taylor

PROCEEDINGS

8/5/77	By BRAMWELL, J. - Copy of order filed that Edward Taylor be prohibited from retaining William Erlbaum in connection with a grand jury subpoena served on 7/18/77, etc. (1)
8/5/77	Notice of appeal from order of 8/5/77 filed (2)
8/8/77	Copy of docket sheet and copy of notice of appeal mailed to court of appeals
8/9/77	Sealed papers, Sealed 7/29/77 BY BRAMWELL, J. in envelope, filed. (3)
8/24/77	Envelope place in vault.
8/26/77	Scheduling order received from the C of A that the record be docketed on or before 8/30/77. tk (4)
8/29/77	Stenographer's transcript dtd 7/29/77, filed. tk (5)
8/29/77	Letter of William Erlbaum filed dtd 8/12/77 asking that a copy of this letter and transcript be docketed and made a part of the record. jlj (6)
8/30/77	Record on appeal certified and mailed to the C of A. tk -----

Law Offices
Lyon and Erlbaum

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LETTER OF AUGUST 12, 1977
RE: NUMEROUS ERRORS IN MINUTES

HERBERT ALLAN LYON
WILLIAM M. ERLBAUM

123-60 83RD AVENUE, Kew Gardens, N.Y. 11415
(212) 263-3235

CHARLES WENDER

August 12, 1977

Howard A. Goodman,
Acting Official Court Reporter
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: In the Matter of Grand Jury Minutes (77-C-1609), July 29, 1977

Dear Mr. Goodman:

At the conclusion of the proceedings before Judge Bramwell on July 29, 1977, you indicated that you had had trouble taking down what was said. I invited you to telephone myself and/or Mr. Marcus before transcription of the minutes if you were in doubt as to what had been said, but you didn't telephone me (I presume you didn't telephone Mr. Marcus). However, in reviewing the minutes I find that there are corrections that should be made and I want to call them to your attention, and I'm sending a copy of this letter to Mr. Marcus in case he wants to call your attention to any others.

On page 9, lines 3, 4 and 5, particularly the phrase "on the wake of your Honor's thinking", I don't believe that that is what I said and I don't know what the expression means as I read it in the minutes.

On page 9, lines 11, 12 and 13, particularly the phrase "issue is not whether one gentleman is pitted against the other", the "not" should not be there (I think that Mr. Marcus will agree that I repeatedly took the position that the critical issue was indeed whether one man would be pitted against another).

On page 10, line 17, the short sentence "I guess for their reasons" - I do not believe this is correct and I do not remember saying this.

Lyon and Erlbaum

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Howard A. Goodman

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August 12, 1977

On page 10, Line 23, through page 11, line 2 - This sentence as rendered in the minutes does not seem correct.

On page 12, lines 7 through 9 - What you have rendered is simply not what I said. In substance what I said was that Mr. Marcus had characterized my position to be that a sufficient conflict did not exist, and I sought to indicate that I hadn't said that, but, rather, had said that no conflict appeared to exist.

On page 14, lines 8 through 11, particularly the phrase "Who proffered immunity either to Mr. Simon or to, indeed to Mr. Joseph", appears to be incorrect.

On page 19, lines 2 through 10 - I certainly did not say what is now contained in that section of the minutes.

On page 19, lines 23 through 25 - Again, that is not what I said sir.

On page 20, lines 9 through 12, particularly the phrase "He can't by law let me see those documents". I did not say that the attorney for the government can't by law let me see the documents.

In addition to the above specifics, there appeared to be other mis-statements and some omissions from the minutes.

When I last checked with the Clerk's Office, a copy of the minutes had not been filed by you. Would you be kind enough to file a copy at your earliest convenience, along with a copy of this letter, so that my objections as to the accuracy of the transcript will be reflected as a matter of record.

Thank you for your attention.

Very truly yours,

William M. Erlbaum
William M. Erlbaum

WME:ep

cc: Stanley Marcus, Asst. United States Attorney
Eastern District of New York

cc: Clerk of the United States District Court
Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

In the Matter :

-of- :

GRAND JURY MINUTES. :

-----x

United States Courthouse
Brooklyn, New York

July 29, 1977

B e f o r e :

HONORABLE HENRY BRAMWELL, U.S.D.J.

IN CHAMBERS

HOWARD A. GOODMAN
ACTING OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: STANLEY MARCUS, ESQ.
-and-
SAMUEL DAWSON, ESQ.

Assistant U.S. Attorneys

WILLIAM ERLBAUM, ESQ.
Attorney for Defendant
123-60 83rd Avenue
Apartment 1A
Kew Gardens, New York 11415

Also Present:

EDWARD TAYLOR

JEFFREY PODEL

LEONARD SIMON

1 MR. ERLBAUM: Your Honor, Mr. Joseph is out of
2 State on vacation and Mr. Simon will be here shortly.

3 THE COURT: All right, you have the appearances.

4 MR. MARCUS: Your Honor, firstly, let me state
5 what this is all about. This is a question as to
6 whether there is a conflict of interest in repre-
7 sentation by Mr. Erlbaum of Mr. Eddie Taylor and
8 a number of other individuals, Gary Joseph, Leonard
9 Simon and Jeff Podel. The issue raised before this
10 Court is this: On July 18th the Grand Jury subpoena
11 to testify was served upon Mr. Taylor calling for
12 him to appear before the Grand Jury to testify.
13 Thereafter, he called the offices of the United
14 States Attorney and spoke with me personally and
15 indicated that he would be represented, that he
16 retain the services of Mr. Erlbaum in connection with
17 his Grand Jury appearance. Mr. Erlbaum was out of
18 town at the time and we adjourned the matter from
19 the 20th until today's date which was further
20 adjourned until the 3rd of August next week to give
21 the Government an opportunity to present this matter
22 to this Court. The particular issue is whether or
23 not Mr. Taylor can retain the services of Mr. Erlbaum
24 who is presently representing Leonard Simon and
25 Gary Joseph and Jeff Podel in this case arising from

1 an investigation into the organization and operation
2 of direct lease day care center program within the
3 City of New York.

4 At or about June of 1976, a Grand Jury was
5 impaneled in this District and has been investigating
6 for some time, since June of 1976, a series of allega-
7 tions and violations of Federal law. Among the
8 allegations that have risen involve violations of
9 Title 18, extortions, and violations of the Hobbs
10 Act, Title 18, Section 1951 -- use of facilities in
11 interstate commerce. In order to perform that,
12 U.S. Code 1592, violation to defraud the United States
13 and the section involved is 7201, tax evasion, and
14 7206, falsifying of various tax returns with the
15 Internal Revenue Service. As I have indicated there
16 has been conducted an investigation for some time.
17 There is a history that I think should be presented
18 to the Court before we go any further.

19 Mr. Podel was subpoenaed to testify before
20 the Grand Jury last summer. At that time, in connec-
21 tion with this investigation, he was represented by
22 Mr. Erlbaum's partner, I believe a Mr. Herbert Lye,
23 I don't know. Some time thereafter we learned that
24 Mr. Erlbaum indicated that he also represented
25 Mr. Simon and subsequently thereto, maybe it was

1 before that he represented Mr. Gary Joseph as well.
2 The allegations involve wrongdoing on the part of
3 Mr. Joseph and others. Mr. Erlbaum has been advised
4 that Mr. Gary Joseph is the subject of, or the target
5 of a particular investigation. Originally, sub-
6 sequent to that, we issued a subpoena that called
7 upon Leonard Simon to appear before the Grand Jury.
8 That a United States Attorney wished to interview
9 him. At the time Mr. Erlbaum made another appearance
10 and we indicated at the time that there was a
11 potential if not real conflict of interest between
12 the representation of Mr. Simon and at the time, the
13 representation of Mr. Joseph. We took the matter
14 before Judge Neaher who was at that time miscellaneous
15 judge. At that time, the Judge ruled on my motion
16 that sufficient conflict was not present as such to
17 order the gentleman to choose or elect or order
18 Mr. Erlbaum not to represent both of them. At the
19 time the Judge was fully advised of all of the
20 individuals in question. Mr. Taylor wasn't involved
21 at the time. The gentleman indicated, that is to
22 say, Mr. Joseph and Mr. Simon indicated that they
23 wished to continue with the representation of
24 Mr. Erlbaum. That immediately created an issue with
25 regard to Mr. Edward Taylor.

1 A Grand Jury subpoena was issued for his
2 appearance and I asked Mr. Erlbaum, I said that our
3 investigations had revealed facts and circumstances
4 which lead us to firmly believe that the responses
5 of Mr. Taylor might, as to the questions we would
6 put to him assuming he were to give testimony before
7 the Grand Jury, would necessarily pit Mr. Erlbaum's
8 other clients against Mr. Podell, Mr. Simon and
9 Mr. Joseph. Indeed, Mr. Joseph as well we indicated,
10 if Mr. Taylor were to take the Fifth Amendment of
11 the United States Constitution and refuse to testify
12 for the Grand Jury, it is our intention to seek a
13 formal immunity order from the Department of Justice
14 in order to compel his testimony. Mr. Erlbaum
15 indicated that he would speak with his client at
16 length and he said that he would report back to me.
17 So, he reported back to me and indicated that in his
18 view there was not a sufficient conflict of interest
19 as far as he was able to tell. We indicated that
20 we were convinced that there was such a conflict of
21 interest and hence we brought the matter before your
22 Honor.

23 At this point the United States Attorney
24 indicated to Mr. Erlbaum it would seek to make a
25 factual presentation to the Court in-camera in order

1 to make the conflict of interest clear and immediate
2 just as to what facts had been developed which leads
3 us to the necessary conclusion in our view that there
4 is a conflict of interest which is direct and immed-
5 iate. Accordingly, we stated that it would be our
6 intention to hand up to the Court an affidavit from
7 myself having certain materials which are appended
8 to the affidavit which consist of certain Grand Jury
9 materials, testimony and like.

10 THE COURT: Put down that Mr. Simon is present
11 in chambers.

12 MR. MARCUS: Accordingly, we indicated to
13 Mr. Erlbaum it would be our intention to present
14 certain materials in-camera for the Court's examina-
15 tion. We indicated that they are Grand Jury materials
16 and that this investigation is an active investigation
17 for one and that there would be apparent violations
18 of the Grand Jury Secrecy Pact to make these materials
19 available to Mr. Erlbaum in the course of this litiga-
20 tion. What we seek to do is immediately to make
21 available to the Court the affidavit which we have
22 prepared and certain Grand Jury materials which we
23 have appended to that affidavit. In addition, we have
24 prepared an order for the Court in which basically,
25 we seek relief of two kinds. First would be a

1 judgment from the Court assuming arguendo our dis-
2 cussions that it is necessary for the Court to render
3 such a judgment that Mr. Taylor could not retain the
4 services of Mr. Erlbaum in the course of this pro-
5 ceeding because there would be a direct and immediate
6 conflict that would arise. Secondly, that the Court
7 would order sealed the examination of the records in-
8 camera or the affidavit and the Grand Jury material
9 we had presented.

10 THE COURT: That's no problem, Mr. Marcus.

11 MR. ERLBAUM: The situation is rather broader.
12 There are certain things that have not been brought
13 out. This investigation doesn't go back to last
14 year. It goes back about ten years and I have
15 represented most of these people in the investigation
16 of the entire matter by Mr. Ruskin's office who is
17 the Commissioner of Investigations for the City of
18 New York. Now, these people are tied by ties not
19 only in business but of family. I have represented
20 their family for many years. Mr. Taylor is the
21 brother-in-law of Mr. Simon and Mr. Taylor is married
22 to Mr. Simon's sister. These are reputable people
23 who meet socially together. We have gone through an
24 entire investigation in their case now for several
25 years. Now it seems to me that literally what is

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involved is unscrambling an egg. Moreover, I objected to your Honor receiving the materials in any in-camera proceeding. Before your Honor receives the material I propose that it would be on the wake of your Honor's thinking. I want your Honor to know that basically I have agreed with Mr. Marcus' request if one is pitted against the other, that indeed a conflict would exist. That is whether the Government gives immunity is not the test. The answer of the test is who are the targets or who are the witnesses and your Honor, these are subject to change. As I said, the central issue is not whether one gentleman is pitted against the other. It's Mr. Taylor's representation that is involved today and his constitutional rights.

He has asked me to represent him and I have agreed to take that employment. I don't dispute Mr. Marcus' good faith. I have no basis. When he says that he is convinced that there is a conflict but the point is that's not the issue. The issue of one pitted against the other. With utmost respect to the Court, it would be fair to say that your Honor has not learned of this case until now but I have lived with this case for several years --

THE COURT: I have no background with the case other than perhaps I may have read something counselor

1 in the newspapers but other than that I have no
2 connection in any way.

3 MR. ERLBAUM: Mr. Marcus is asking you to
4 decide through a few documents, to determine whether
5 or not the issue as framed, where there is no indict-
6 ment, it is just an ongoing investigation and by
7 calling it a Grand Jury matter it doesn't impose that
8 seal of secrecy attached frivolously to the documents.
9 There has been no reason given why Mr. Taylor must
10 make the determination whether to seek my employment.
11 For instance, nothing has been shown, no reason why
12 a conflict exists. Now, I have represented
13 Mr. Simon on many occasions and Mr. Simon and
14 Mr. Podel earnestly seek to see whether there is a
15 conflict for if there is a conflict then one shouldn't
16 be in it. They persist in saying that they want my
17 representation. I guess for their reasons. They
18 spent much money over the years and have been through
19 such an ordeal since the family was being investi-
20 gated. I have been their family lawyer for many
21 years in many matters. In Mr. Simon's election case.
22 Both Mr. Simon and Mr. Podel want me to represent
23 Mr. Taylor. Mr. Taylor is a businessman. I submit
24 to your Honor that while the Supreme Court has upheld
25 in-camera secret types of showing it to the Court

1 in wiretap situations that this would be in excess of
2 authority in the Alderman decision. I don't think
3 that anything would be let out of the bag. I don't
4 think that anything that Mr. Marcus has where
5 Mr. Taylor is indicated that this man would be likely
6 pitted against this man or vice versa. This case was
7 heard before and the Judge, Judge Neaher who denied
8 a similar application as your Honor is asked to do.

9 THE COURT: Did Judge Neaher look at the
10 documents in-camera?

11 MR. ERLBAUM: The Government prepared some
12 documents, some sort of a package. Judge Neaher
13 did not look at the documents in-camera.

14 THE COURT: How many individuals were involved
15 with Judge Neaher?

16 MR. ERLBAUM: Mr. Podel was involved and
17 Mr. Joseph at the time but the decision as it came
18 out refers to Mr. Getz who appeared once before the
19 I.R.S. with reference to many different names. I
20 don't recall whether Mr. Taylor came up who is a
21 member of the same family.

22 My final point is this. Without express
23 authority of the case, the Alderman case, the Supreme
24 Court, authority, it seems to me it would be wrong
25 and without elaborating, your Honor, knowing this

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1 case for a number of years, it would be wrong for me
2 as an officer of the Court in good standing and thank
3 goodness, that my colleagues have faith in me that
4 I was elected President of the Bar Association, it
5 would be wrong for me not to have the opportunity to
6 decide on the basis of what materials there are as
7 to whether I should accept this employment. / Your
8 Honor, I don't think that there is a sufficient
9 conflict that exists. On the contrary, I have never
10 seen any evidence by the Government, not one scintilla
11 of facts of this material to show that any conflict
12 exists. If the Government could show Mr. Taylor
13 that he will be pitted against any of these men
14 well, then he doesn't want to hire me. He has told
15 me so. If the Government shows that to me or if I
16 am able to see that material your Honor can order me
17 not to reveal the contents. Mr. Taylor does have
18 is right to counsel.

19 I don't dispute Mr. Marcus' conviction but
20 the issue is who shall counsel Mr. Taylor. As his
21 attorney I must counsel him. Now, Mr. Marcus would
22 have Mr. Taylor accept Mr. Marcus as his attorney
23 for a problem of conflict of interest. That could
24 not be even absent an affirmative order by your
25 Honor, from your Honor to be his counsel. Your Honor

1 is in a different position, in a different role in
2 this proceeding and that's my feelings.

3 THE COURT: Mr. Marcus?

4 MR. MARCUS: There are a number of points that
5 I would briefly like to address myself to. Perhaps
6 the first point is the comment to the prior proceed-
7 ings before Judge Neaher. The issue that was presented
8 to Judge Neaher concerned whether or not Mr. Erlbaum
9 can represent at the time Mr. Joseph, Gary Joseph and
10 Leonard Simon. It was the only issue before the
11 Court. Not whether Mr. Taylor could be represented
12 also. If indeed at that time we had any reason to
13 believe Mr. Taylor existed. I believe it was
14 January of 1977 when we first appeared before
15 Judge Neaher. At that time we stated our views that
16 there was a real conflict and we went before
17 Judge Neaher in the spirit of seeking to explore all
18 facts and records before all of the respective wit-
19 nesses in the hope that they could fully explore in
20 their own way whether they felt there would be a
21 conflict. Thereafter the Government felt indeed that
22 there would be no way of looking into the minds of
23 the various individuals -- in any event, the issue
24 before Judge Neaher was could Mr. Erlbaum represent
25 Mr. Joseph on the one hand and could he represent

1 Mr. Taylor, or Mr. Getz or Mr. Simon and that issue
2 was before Judge Neaher. After exploring the matter
3 and asking them whether they wanted the continued
4 representation and after carefully advising them of
5 the potential pitfalls, that might arise which might
6 prevent Mr. Erlbaum from representing one or the
7 other.

8 This matter came up and was discussed prior to
9 that appearance before Judge Neaher who proffered
10 immunity either to Mr. Simon or to, indeed to
11 Mr. Joseph. At the time, we had not intended to
12 offer immunity. The fact actually, the fact pattern
13 before the Court at that time in our view was sub-
14 stantially different if not wholly different. That
15 the individuals are different and the issues. Can
16 Mr. Erlbaum today represent Mr. Taylor at the same
17 time that he has already been retained to represent
18 Mr. Simon, Mr. Podell and Mr. Joseph? I think there
19 are twofold problems. First we have indicated a
20 response by Mr. Taylor possibly, that Mr. Taylor
21 might invoke the Fifth Amendment in which case we
22 would seek to obtain an authorization from the
23 Department of Justice and an order of immunity.
24 Obviously we intend to take that step because we
25 believe that the testimony of Mr. Taylor will provide,

1 will be extremely important and germane to the entire
2 inquiry. We have made our investigative determinations
3 as to the wisdom of that course of conduct. The
4 second point and I think perhaps the more important
5 point is that the United States is not prepared to
6 make the detailed facts known precisely because we
7 certainly cannot decide on whether a conflict exists
8 or not. We believe, we think that it is a matter
9 for the Court to decide. The position of Mr. Erlbaum
10 is really reduced to, what he is really saying seems
11 to be this: He says Judge, you can't do that. If
12 the Government wants to give you anything, wants to
13 show you anything in fairness it's got to show it
14 to me. Let me make the decision, after all, I
15 represent him.

16 In essence, he's saying that the Court cannot
17 in-camera examine the Grand Jury materials and the
18 Grand Jury proceedings. What we are interested in
19 presenting to the Court is the Grand Jury testimony
20 of a particular witness plus certain documents that
21 are included in the Grand Jury testimony. Mr. Erlbaum
22 well knows that the Grand Jury testimony is secret.
23 It's confidential and that would be a violation of
24 the Federal rules to turn the material over to anybody.
25 It's in the investigative stage and it would be a

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violation for that substantial reason. I would also express to the Court that what Mr. Erlbaum is really saying is, Judge, let me see the material and I'll make the decision. He's saying it seems clear to me that the Court is powerless to act even in the face of a most clear and unmistakable conflict of interest. It is my understanding that that is not the state of the law. Indeed, it would be incredible for that to be the state of the law. The only authority I cite to the Court would be the case recently decided by the Second Circuit which is Abraham V. Studs. It was decided by the Second Circuit June 21, 1977 and the slip number is 1511. Among other things the Court noted in per curiam opinion, the Court basically summarized what was valid as to the state of the law. It said among other things from page 15 and 16 of the slip opinion choice of counsel should not be extracted unnecessarily by the Court. They went on further to say that we stress however that the defendants are not entitled to a joint representation as a matter of right. In the District Court where there is a view to a strong likelihood of conflict, he has the duty to be excused under the potential threat to his Sixth Amendment rights and that's cited in the United States v. Glasser, in that it is appropriate for the Court, that the Court

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1 Court may order the defendant be represented by
2 independent counsel and they cite another case, an
3 older Second Circuit case of United States v.
4 Bernstein. The only factual addition between the two
5 cases is that the reasons were subsequent to the
6 trial and upon appeal, when the issue of dual repre-
7 sentation was raised by the man what was said was
8 that the man couldn't be represented by the same
9 attorney who represented somebody else in the case.
10 We cited simply for that proposition. The Court
11 surely has the power to make an independent determina-
12 tion of things on an immediate and real conflict of
13 interest. Assuming arguendo, the Court has the power
14 to decide what Mr. Erlbaum would have the Court say
15 I would like to look at the materials though you want
16 to present them to the Judge in-camera, unless you
17 furnish them to me, Judge -- effectively, he would
18 be leaving the Court without making its own deter-
19 mination of just this issue.

20 In essence, it is the position that the only
21 way that we can present this issue to the Court for
22 a valid determination by the Court is to furnish
23 certain materials to the Court. It's our view that
24 it would be a violation to make these materials
25 available to Mr. Erlbaum in the course of an ongoing

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1 criminal investigation where some of his clients are
2 targets of the investigation and indeed it would be
3 foolheartedly if not insane for the United States
4 during the course of a valid Grand Jury investigation
5 to turn over testimony and files concerning the
6 investigation. It's our position that the Court has
7 the authority to properly receive the materials and
8 to peruse them in-camera and we believe that the
9 material present clear and unmistakable evidence
10 of a conflict. It will show that Mr. Taylor cannot
11 be represented by Mr. Erlbaum at the same time that
12 he is represented by the other individuals and that
13 is to say Mr. Joseph, Mr. Podel and Mr. Simon.

14 MR. ERLBAUM: It's extraordinary to me sir
15 that the Government when this is in the context of
16 the Grand Jury investigation, cites cases involving
17 trials. That's a different word because of the
18 pleadings and in that framework does not simply state
19 and allege certain misconduct. At the time we came
20 before Judge Neaher, one man was at the time a target
21 of the investigation, Mr. Joseph. Your Honor, I
22 am not at this point looking to determine the high
23 water mark or whether or not the Circuit reversed
24 the District Judge. In other words, it is an appeal
25 to your mind insight and approach to the practice of

1 law and to what the correct position is I am sure,
2 that's the way that your Honor will feel. The many
3 erroneous inquiries put to them by your Honor, that
4 is where by Judge Neaher they understand their rights
5 to distinguish under the sense that they decided
6 to grant somebody immunity. First they decided all --
7 they decided first is that they have to wait and see
8 whether if they take, the Grand Jury invocation of
9 the constitutional privilege against self-incrimina-
10 tion and that hasn't happened. Next they ask the
11 Department of Justice in Washington whether or not
12 it is prepared to give a grant of immunity. It's
13 at the very best not the defendant's situation if the
14 Government has evidence, sir, that Mr. Taylor, pre-
15 sumably, there is no interest in making a case against
16 this man. We are ready to offer him immunity.
17 Apparently, if, through no misconduct by Mr. Taylor
18 they were looking, they were presuming to tell your
19 Honor what the answers would be to the questions that
20 weren't posed today, giving them the opportunity to
21 initially decide whether or not he wants to make that
22 employment because he doesn't know what the case is
23 against him. The case deals with a contention and
24 not an indictment which makes confront and frames
25 the factual issues.

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1 Your Honor frankly cannot indicate prior to
2 today specific knowledge in this case. Your Honor
3 was not engaged in this case and in the absence of an
4 indictment let alone an appeal like the Glasser case
5 where you have a full trial record -- the Government
6 wishes to pit whom against whom. If they were to
7 give Mr. Taylor any factual reason, if he goes
8 before the Grand Jury they are going to ask him the
9 same questions and revert to the documents. Now, the
10 United States is conducting the investigation in this
11 matter and clearly, he can't by law let me see those
12 documents. But, your Honor, that does not deny your
13 Honor the right and power nor does it contend that
14 your Honor doesn't have the power to let me see them.
15 Your Honor, that's what I want to say and I thank
16 you for the chance to say it.

17 THE COURT: Mr. Taylor, you have heard every-
18 thing that has been said here?

19 MR. TAYLOR: Yes, Sir.

20 THE COURT: You understand your right to be
21 represented by an attorney who you may select; you
22 understand that?

23 MR. TAYLOR: Yes.

24 THE COURT: Mr. Taylor, what is your position?

25 MR. TAYLOR: My position is although I probably

1 won't say it as eloquently as these other two
2 gentlemen that preceded me but my position is that if
3 I knew what the United States wanted from me I could
4 then --

5 THE COURT: What is your position with respect
6 to your representation?

7 MR. TAYLOR: I would like Mr. Erlbaum to
8 represent me.

9 THE COURT: Is there anything further?

10 MR. MARCUS: There are a number of points, but
11 first I would like to throw a question to Mr. Taylor
12 which he may or may not choose to answer. I want to
13 ask Mr. Taylor if he is going ahead with the repre-
14 sentation of Mr. Erlbaum if it became the same
15 position of the same person who represented the
16 target and therefore we would not grant immunity.
17 We would therefore be called upon to make a searching
18 and detailed kind of examination when we call him
19 before the Grand Jury and presumably in that context
20 he would invoke his Fifth Amendment rights. Assuming
21 that to be so, your Honor, your position is to keep
22 Mr. Erlbaum and you would be willing to lose the
23 opportunity to have a grant of immunity, Mr. Taylor?

24 MR. TAYLOR: Certainly.

25 MR. MARCUS: There is only one difference in

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1 this case and the other cases that concerns Mr. Taylor
2 and we are not raising an issue as to Mr. Simon and
3 Mr. Podel and we are not raising an issue as to
4 Mr. Joseph. The Government at this time is prepared
5 to seek an authorization of immunity for Mr. Taylor
6 and that is the one difference and it is a substantial
7 one.

8 There is a second difference and that is we
9 are saying it to the Court, your Honor, here's a
10 confidential investigation. Let us show you in the
11 most unmistakable way, there is testimony of a
12 witness in the Grand Jury that Mr. Taylor would be
13 compelled to testify and to respond in a way that
14 would very well pit him against the other individuals
15 in the case. I can't imagine a more clear or more
16 mistakable conflict of interest than the situation
17 which may well implicate other people who are repre-
18 sented by the same attorney to do justice for his
19 clients at the same time.

20 MR. ERLBAUM: Your Honor, Mr. Taylor alone has
21 asked for a particularized statement as to what
22 has been said to his knowledge and on that basis of
23 that information would be able to make a more intel-
24 ligent determination. I have lived with this case for
25 ten years, Judge Bramwell. Mr. Taylor would then

1 have to take up, he would have to seek a new
2 attorney and I don't see how that could be fair to
3 him. I have lived with this case for ten years and
4 what has not been framed by the pleadings in this
5 investigation or the broad perimeters of the
6 statutes, and we don't know who are the targets to
7 this date and may I ask that so we can assess the
8 situation?

9 THE COURT: The Court heard both attorneys
10 on this matter. What I will do at this point is ask
11 you gentlemen to give the Court a short opportunity
12 to consider all of the parties. Will you go outside
13 for a short time?

14 MR. SIMON: May I say something?

15 THE COURT: Yes, Mr. Simon.

16 MR. SIMON: If there is a conflict, I think
17 I would prefer that Mr. Erlbaum represented Mr. Taylor
18 and that I would drop out. Not that I want to give
19 Mr. Erlbaum up. I am happy with him as my attorney.
20 I said that I am using Bill Erlbaum, that's our
21 family lawyer. If there is a conflict with Joseph
22 Podel, let's say, then I'll have to get myself
23 another attorney. I want Bill Erlbaum to represent
24 me. He's the only attorney, the only man I would
25 trust with my rights other than myself in a situation

1 of this type. I don't know if my rights are being
2 discussed.

3 THE COURT: How many people do you represent
4 in this matter at this point?

5 MR. ERLBAUM: Well, I appeared originally
6 with Mr. Getz and he has other counsel. In the last
7 year and a half I have appeared, or my office has
8 appeared for Mr. Line once -- twice, Mr. Podel, I
9 have appeared for Mr. Simon --

10 THE COURT: Up to this point you have appeared
11 for everyone, even Mr. Taylor?

12 MR. ERLBAUM: Yes, your Honor.

13 THE COURT: In connection with this proceeding?

14 MR. ERLBAUM: When the I.R.S. started this
15 thing I then sort of appeared at that point for
16 Mr. Simon, and I appeared for Mr. Podel or my partner
17 appeared.

18 THE COURT: Did you or did you not appear
19 previously with him?

20 MR. ERLBAUM: This is the first time that
21 I am appearing up to now.

22 THE COURT: You appeared for Mr. Simon,
23 Mr. Podel, Mr. Getz --

24 MR. ERLBAUM: And Mr. Joseph. Mr. Joseph was
25 away in the beginning.

1 THE COURT: Give us a few minutes and let me
2 consider this all. If you would all step out.

3 (Whereupon, everybody left the Judge's chambers.)

4 (Whereupon, at 4:55 P.M. everybody re-entered
5 the chambers.)

6 THE COURT: After consideration and after
7 hearing all of the parties, the Court is going to
8 grant the Government's offer for this in-camera
9 application in connection with this particular in-
10 camera inspection in connection with the material
11 that the Government has and the Court is going to
12 make that inspection at this time if the material is
13 available.

14 MR. MARCUS: It's available, your Honor.

15 At this point I hand over to the Court an order which
16 is appended with an affidavit and a copy of the order
17 I have shown to Mr. Erlbaum. I have given it to
18 him and as to the order itself, on the first page,
19 there is one matter there that Mr. Erlbaum and I have
20 agreed upon and that is to the extent that the order,
21 that the Court agrees to sign the order and it reads
22 this will order William Erlbaum from representing
23 Edwin Taylor and in that connection, again a subpoena
24 was served on July 18th of 1977, compelling Mr. Taylor
25 to appear before the Grand Jury and the Government

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1 would have no objection to changing that language
2 if the Court would be so disposed to rule in favor
3 or Mr. Taylor could not retain Mr. Erlbaum and
4 exchange that for Mr. Erlbaum not to represent
5 Mr. Taylor. I think that is a fair statement.

6 MR. ERLBAUM: Agreed. Can we also, should
7 the matter obviously necessitate itself or should
8 your Honor be so inclined in granting the application
9 in kind, that we are not precluded from testing the
10 validity of the decision in the Circuit Court if it
11 seems necessary?

12 THE COURT: Certainly. Is that everything?
13 I think Mr. Podel wants to say something.

14 MR. PODEL: I am confused. I'm reading the
15 order and what happens if we decide or your Honor
16 decides to rule in favor of the United States.
17 Aren't we allowed to decide if there is a conflict?

18 THE COURT: That's an issue we won't get to
19 at this time.

20 MR. PODEL: If there is a conflict, Mr. Simon
21 said that he was willing to have Mr. Erlbaum represent
22 Mr. Taylor and not us --

23 MR. MARCUS: The position your Honor of the
24 Government is at this point that Mr. Erlbaum already
25 represents three of these gentlemen in this proceeding

1 before whatever appearances were made before the
2 Grand Jury. At this point Mr. Taylor is now coming
3 in and what may happen --

4 THE COURT: I'm not going to decide at this
5 time. I'm going to look at the material before me.

6 MR. ERLBAUM: Do you want us to wait outside?

7 THE COURT: Yes, will you gentlemen please
8 wait outside. Take a 15 minute break. Go downstairs,
9 and we'll resume back here in ten or 15 minutes.

10 MR. MARCUS: For the convenience of the Court,
11 I hand the Court a second copy.

12 (Whereupon, everybody left the Judge's
13 chambers.)

14 (Whereupon, at 5:05 P.M., Mr. Taylor was
15 called into the Judge's chambers without the presence
16 of his attorney or the Government attorney.)

17 THE COURT: We are now in chambers and present
18 is Mr. Edward Taylor, my two law clerks, myself and
19 the court stenographer.

20 Might I say first whatever you say here is said
21 in confidence. The record is going to be sealed and
22 no one will know what you say and no one will know
23 whether or not what I do is based on what you tell
24 me or not. You see whatever is said here is to be
25 sealed. There is a likelihood of a conflict of

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1 a conflict of interest here. Now, the Government
2 has said that they might give you immunity from
3 prosecution which means you will not be criminally
4 liable for any testimony or any answers or anything
5 that you might say before the Grand Jury which might
6 be criminal in nature or not, do you see that? On
7 the other hand, there is a possibility of a criminal
8 liability if you don't get immunity of course, you
9 have substantial losses of protections of what you
10 might get if you appear before the Grand Jury. When
11 you are given immunity to fail to answer, you can be
12 liable for either civil or criminal contempt and if
13 you refuse to answer.

14 Now the testimony before the Grand Jury must
15 be truthful because there is possible perjury. If
16 your testimony is not truthful and based on what the
17 Court has seen in its in-camera inspection, it's
18 shown the Court that they have prior information on
19 some of the areas that they may question you about.

20 Now, you can persist in the position you take
21 and if it's knowingly done, voluntarily done, and if
22 it's intelligently done, the Court is duty-bound by
23 the position that you take and the Court can reach
24 an independent judgment and decide from whatever
25 your position may be.

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1 Now, your position stated for the record con-
2 cerning the representation; do you understand what I
3 just said to you?

4 MR. TAYLOR: I think I did. The best way that
5 I can answer this is --

6 THE COURT: Is there anything you didn't
7 understand?

8 MR. TAYLOR: I really don't think so. I
9 understood pretty much what you said, your Honor.
10 We are talking about my representation by Mr. Erlbaum.

11 THE COURT: Specifically that representation.

12 MR. TAYLOR: The only thing that we could do
13 at the cost of being redundant would be if they were
14 to ask me questions that I thought would be in
15 direct conflict or contrary or directly against
16 anyone of the people that would be involved, I think
17 it would be to my benefit to seek other counsel. But
18 at this point, when Mr. Marcus -- when I asked
19 Mr. Marcus why I am being called he said that he
20 can't go into that. I told him at this point it would
21 be very foolish on my part to be served with a
22 subpoena and to appear in Court without representation.
23 Mr. Erlbaum has been our family counsel for some
24 years, for some twelve years. I did ask Larry Simon
25 to represent me and he refused. It's no secret to

1 the Court that he is my brother-in-law.

2 THE COURT: That's Leonard Simon?

3 MR. TAYLOR: That's Leonard Simon. I feel
4 that I would like Bill Erlbaum to represent me. The
5 fact is that he's a very capable man. I really don't
6 know of any other attorney who could represent me.

7 THE COURT: From the inspection of what the
8 Government has put before the Court, the Court knows
9 that you will be asked questions requiring you to
10 implicate others. This is known from what is before
11 the Court. You see, I'm just throwing it out to you
12 as part of the information on whether or not this
13 would change your position in any respect.

14 MR. TAYLOR: My feeling is that I would have
15 no fear going before the Grand Jury, your Honor,
16 myself. I have nothing to hide except that the
17 fact that I would just like the best representation
18 that I can get for myself.

19 THE COURT: Thank you.

20 (Whereupon, everybody was excused from the
21 Judge's chambers.)

22 (Whereupon, at 5:15 P.M. all parties returned
23 the Judge's chambers.)

24 THE COURT: All right, the Court has heard
25 and considered all parties and that included

1 Mr. Taylor in this matter. The Court after 31
2 having examined in-camera the affidavit and papers
3 submitted to it by the United States Attorney, takes
4 the position, the Court will sign the order to the
5 effect that it orders Edward Taylor, prohibits him
6 from retaining the services of William Erlbaum on
7 the question of the inquiry in connection with the
8 Grand Jury subpoena served on July 18th, 1977, and
9 of course, the affidavit of Mr. Marcus next to the
10 exhibit are sealed by the Court, and it is so
11 ordered.

12 If Mr. Erlbaum wishes to go up on appeal on
13 this proceeding you can get the minutes from the
14 stenographer.

15 MR. ERLBAUM: Well, may I say just this:
16 I will consult with Mr. Taylor -- it's Friday now
17 and I will consult with Mr. Taylor and with the
18 others and try to simulate what has happened here
19 and make a decision. May I respectfully ask for a
20 reasonable time, let's say Tuesday to make that
21 decision. Much has been said here and I would like
22 a chance to reflect on it and talk to these men. I
23 would like an opportunity to reach Mr. Joseph who is
24 out of the State right now and share with him fully
25 what has happened here. I think that I will ask for

1 the transcription of the minutes. I think 32
2 that it is sensible to do that so we can study the
3 minutes.

4 THE COURT: Now, the in-camera portion with
5 Mr. Taylor, it's not secret. He has continued in the
6 position that he has taken and the Court was going
7 to seal the record but the Court doesn't really see
8 any reason for sealing the record since he has
9 taken the same position.

10 MR. ERLBAUM: Well, I'm asking the reporter
11 what he thinks he can reasonably get these minutes,
12 when they could be produced for the Grand Jury and
13 possibly Appellate Division purposes. I need the
14 record in any event. I would then ask to adjourn this
15 without date upon my representation that by next
16 Tuesday I will make known to Mr. Marcus and to the
17 Court any representation as to whether we are going
18 to appeal. If we are going to appeal I'll bring the
19 review mechanism into place then. If we are going
20 to appeal I'll make the appeal with all direct speed.

21 The date for the subpoena is August 3rd. We
22 don't have to change that date. I'll let Mr. Marcus
23 know by Tuesday about the appeal.

24 THE COURT: You have to appeal immediately.

25 MR. ERLBAUM: I'll do so if we decide to do so

1 with all deliberate speed in the presentation of
2 a set of papers.

3 THE COURT: If you appeal immediately you can
4 get a stay pending that part of your appeal.

5 MR. ERLBAUM: May I ask logistically,
6 Monday is the next business day and by Tuesday we
7 will have to reach a conclusion as to whether to
8 choose or to exercise whatever appellate remedy we
9 have. May I point out that Mr. Taylor will be in
10 the process --

11 THE COURT: He may need a little extra time
12 to find an attorney.

13 MR. MARCUS: My only point is that this
14 matter has been dragging on for an inordinate period
15 of time. We have extended it --

16 THE COURT: Do you want to give a definite
17 date of which you intend to let us know whether or
18 not you are going to submit an appeal?

19 MR. ERLBAUM: I'll let you know by Tuesday.
20 That will be Tuesday, August 2nd. If we are going to
21 appeal I need a reasonable amount of time.

22 THE COURT: How much time are you asking for
23 in connection with this?

24 MR. ERLBAUM: Well, anything that's reasonable
25 a week or two.

1 THE COURT: Two weeks from today? You'll
2 let me know if you file an appeal?

3 MR. MARCUS: I have no objection to that, your
4 Honor. That is two weeks from August the 2nd by the
5 16th of August.

6 MR. ERLBAUM: That's what I am asking for now.

7 MR. MARCUS: I have no objection, your Honor.
8 The affidavit will be sealed?

9 THE COURT: Yes.

10 MR. ERLBAUM: Now, your Honor, up to this
11 point in the discussions and should we not take an
12 appeal and should we decide to accept Mr. Marcus'
13 opinion that there is indeed a conflict, your Honor
14 has found that Mr. Taylor and the other men that
15 have been mentioned, in one way or the other, we'll
16 probably explore it revolving around the conflict --
17 what I am saying is that if I stay in the case at all
18 and I decide on who I will represent, should it come
19 to pass that it's our collective decision that I
20 represent Mr. Taylor then I'll come back to your
21 Honor.

22 THE COURT: Let me state at this point the
23 order states that Mr. Taylor is to retain someone
24 other than you to represent him for the purposes of
25 this matter.

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1 MR. ERLBAUM: Your Honor views that another
2 attorney should be obtained whether I am still repre-
3 senting the other men in any event?

4 THE COURT: Definite positions have been
5 taken and based on these definite positions the
6 Court has taken a definite position vis-a-vis
7 yourself and Mr. Taylor and that position is that he
8 is ordered to retain someone other than yourself
9 to represent him in this proceeding.

10 MR. ERLBAUM: As long as that is the order
11 of this case I am sure that I will abide with that.
12 What I am trying to say is circumstances do change
13 and I state now that if after giving it some thought
14 it is my intention to, to disclose that change of
15 circumstances --

16 THE COURT: It is the definite order of this
17 Court. You see what you would have to do is, you
18 would have to make an application before this Court
19 with papers to that effect. At this point this is
20 the order of the Court and you would have to guide
21 yourself accordingly.

22 MR. MARCUS: The only point that I would like
23 to make in light of Mr. Erlbaum's statement is that
24 there is a possibility that he may drop Mr. Joseph,
25 or Mr. Podel or Mr. Simon or any number of them,
one or more of them, and pick up Mr. Taylor. The

1 problem is that we have a situation that has been
2 litigated and relitigated. We have a real need for
3 some dispatch here. I have no real objection to giving
4 Mr. Erlbaum a week or ten days to perfect an appeal
5 if he chooses to take it up. I have no real objection.
6 In connection with that, he then may drop the other
7 gentleman and then pick up Mr. Taylor when the order
8 seems perfectly clear that Mr. Taylor is ordered to
9 retain new counsel --

10 THE COURT: The purpose of the time being given
11 is for appeal only. It's not for the purposes of re-
12 adjusting counsel's position.

13 MR. ERLBAUM: I understand it's for appeal
14 only.

15 THE COURT: I don't know what I will do until
16 you have presented the papers to me and I have checked
17 them. I would feel that based on the fixed positions
18 of the parties up to this point that your in fixed
19 positions that would be my gut reaction. But I don't
20 want to say what you mean until I see your papers.
21 But I feel that you are in fixed positions up to this
22 point.

23 MR. ERLBAUM: Your Honor has made the position
24 of the Court unmistakable.

25 MR. TAYLOR: You all spoke about the appeal.

1 The fact that I am ordered by the Court to get new
2 counsel. Am I supposed to appear before the Grand
3 Jury this coming Wednesday, I don't know?

4 MR. ERLBAUM: Evidently, some extension has
5 to be given to that.

6 MR. MARCUS: The Government will adjourn the
7 appearance under two conditions. First, Mr. Erlbaum
8 agrees to get back to the United States Government
9 by next Tuesday in connection with whether or not
10 he will perfect an appeal before the United States
11 Court of Appeals and assuming there is an unfavorable
12 ruling and he is forced to appear before the Court,
13 the Grand Jury, we would give him every opportunity
14 to take the issue to the Circuit Court of Appeals.
15 If he chooses not to do so for any number of reasons
16 to appeal the decision, then we would expect at this
17 point to have Mr. Taylor obtain counsel and get back
18 to us within a week or ten days. We'll reschedule
19 the matter within two weeks from the 3rd of August
20 and let you know whether or not to appear at a future
21 date.

22 MR. ERLBAUM: Thank you, your Honor.

23 MR. DAWSON: Thank you, your Honor.

24 (Whereupon, at 5:30 this in-chambers motion
25 recessed.)

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A

42

-----X

In Re Grand Jury Subpoena
DirectingORDER

EDWARD TAYLOR

To Appear And Testify Before
A Grand Jury On July 20,
1977 at 10:00 A.M.

-----X

Upon the annexed affidavit of STANLEY MARCUS of July 29, 1977 and the accompanying exhibits appended thereto, which are ordered sealed by this Court, and all proceedings held herein, and good cause having been shown, it is hereby,

ORDERED that the affidavit of STANLEY MARCUS and the accompanying exhibits be sealed pending further order by this Court; and it is further

Edward Taylor
William Erlbaum, Esq.
ORDERED that ~~William Erlbaum, Esq.~~ be prohibited from ~~representing~~ *William Erlbaum, Esq.* EDWARD TAYLOR in connection with a grand jury subpoena served on July 18, 1977, compelling the appearance of MR. TAYLOR before a grand jury duly empanelled pursuant to law within this District on August 3, 1977.

Dated: Brooklyn, New York
July 29, 1977

H/ HENRY BRAMWELL
HENRY BRAMWELL
United States District Judge

A 43

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRAMWELL J.

-----x
In the Matter

- of -

NOTICE OF APPEAL

GRAND JURY MINUTES,
-----x

77 C 1609

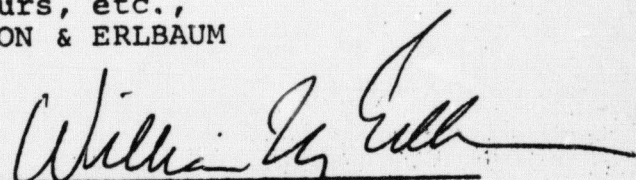
S I R S :

PLEASE TAKE NOTICE, that EDWARD TAYLOR hereby appeals to the United States Court of Appeals for the Second Circuit from an order of the Honorable Henry Bramwell, United States District Judge, Eastern District of New York, made on or about July 29, 1977, in chambers, directing that EDWARD TAYLOR be prohibited from retaining William Erlbaum, Esq., in connection with the grand jury subpoena served on July 18, 1977, compelling the appearance of Mr. Taylor before a grand jury empanelled within the Eastern District on August 3, 1977.

Dated: Kew Gardens, New York
August 5, 1977

Yours, etc.,
LYON & ERLBAUM

TO: HON. DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF
NEW YORK
Attn. Stanley Marcus,
Asst. U.S. Attorney
OR: Chief Asst. U.S. Attorney
(now Acting U.S. Attorney)
EDWARD KORMAN

By 
WILLIAM M. ERLBAUM,
a member of the firm
123-60 83rd Avenue
Kew Gardens, New York 11415
(212) 263-3235
For Preparation, Service and
Filing of this Notice of Appeal

Send 2 copies
of Appellate Brief
in 9/12/77
WMB



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